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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. **750**

FRANK DAVID, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Frank David, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on February 2, 1959.

OPINIONS BELOW

The Court of Appeals for the Sixth Circuit wrote no opinion. Its order affirming the judgment of the District Court is printed as Appendix A to this Petition. The opinion of the District Court is reported at 168 F. Supp. 269 and is printed as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 2, 1959 (Appendix A). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Were the requirements of the *Jencks Act*, 18 U.S.C. § 3500, satisfied where the Government removed from the statement of the chief Government witness all exhibits, originally attached thereto and referred to therein, and testified to by the witness in his direct testimony, before delivering the statement either to the trial court for an *in camera* inspection, or to Petitioner for his examination and use on cross examination?

2. If the answer to Question 1, *supra*, is in the affirmative, then does the *Jencks Act*, 18 U.S.C. § 3500, as so construed, deny to Petitioner the due process of law guaranteed him by the Fifth Amendment, as determined by this Court in *Jencks* v. *United States*, 353 U.S. 657?

3. Where the Government claims that Petitioner has understated his income for the years prior to the indictment period, is not the Government also required to credit Petitioner for these claimed understatements as a likely source of funds for the indictment years? Does not the failure to include these understatements, or negative them, require—under *Holland* v. *United States*, 348 U.S. 121, and *United States* v. *Massei*, 355 U.S. 595—that the Government prove some other likely source from which Petitioner's alleged net worth increases arose?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The *Fifth Amendment to the Constitution of the United States* provides in relevant part:

> "* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *"

The *Jencks Act*, 71 Stat. 595, 18 U.S.C. § 3500, provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such

delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

A. Proceedings Below

Petitioner was convicted in the United States District Court for the Northern District of Ohio, Eastern Division, on two counts of an indictment which charged him with attempting to defeat and evade a part of his individual federal income taxes for the calendar years 1948 and 1949 in violation of Section 145(b) of the Internal Revenue Code (5a-6a)[1] Petitioner was sentenced to one year and fined $2500.00 on each of the two counts, the sentences to run concurrently (612a), for a total sentence of one year and $2500.

[1] This Petition makes reference to the following: Appendix for Appellant and Appendix for Appellee used in the Court below and accompanying this Petition; the original record of the District Court, on file in the office of the Clerk of this Court; and the Appendix to this Petition which is a part hereof. References to Appendix for Appellant are designated by "a" following the page number; references to Appendix for Appellee are designated by "b" following the page number. References to the Appendix to this Petition are designated by "App." preceding the page number. References to other materials are specifically descriptive.

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on February 2, 1959 (Appendix A, *infra*). Although both Petitioner and Respondent each filed substantial and detailed briefs in the Court of Appeals and took full time on oral argument, and despite the fact that important questions (including a constitutional issue) were raised, the Court of Appeals wrote no opinion. It merely "affirmed upon the grounds and for the reasons stated in the memorandum opinion of the United States District Court * * * " (Appendix A, *infra*).

B. The Jencks Issue

At the conclusion of the direct testimony of the chief Government witness, Special Agent Keller, who headed the investigation of Petitioner, Petitioner moved for an order of the Court—pursuant to 18 U.S.C. § 3500 and *Jencks* v. *United States*, 353 U.S. 657—for production of Keller's report of examination for impeachment purposes (135a-141a). Government counsel at first denied that any such statement existed, and also objected on legal grounds (141a). After a brief *voir dire* examination conducted by Petitioner's counsel, it was established that Keller had submitted a report disclosing the results of his investigation, and that there were exhibits attached to this report (142a, 143a). Petitioner's counsel thereupon again moved for production of the report (142a-143a). The Government continued to oppose,[2] and the Court reserved judgment (144a). On the next succeeding day the counsel for the Government announced "that I have

[2] "We believe that there is no authority, either in law or any case *in that loose statute* that would permit such a disclosure" (144a) (emphasis added).

contacted the Department of Justice and we are now willing to allow counsel for the defendant to examine the report of Mr. Keller" subject to certain conditions (147a). At the Government's request, the Court excised two items from the report and transmitted it to counsel for Petitioner (148a-149a).

When the report was delivered to Petitioner's counsel, he shortly observed that the report made reference to exhibits which were not attached to the report. He thereupon requested

> "that government counsel be required to produce any statements attached to this report of examination of Mr. Keller, the government witness, which relates to the subject matter of currency on hand between the years 1943 to 1949, inclusive, or relating to any purported statements with respect to the subject matter of cash on hand, or to the subject matter of Mr. Keller's testimony on direct examination." (150a-151a).

To the Court's request for clarification, Petitioner's counsel replied:

> "Any statements, your Honor, attached to the report of examination submitted to the government by Mr. Keller, which were made a part of his report of examination." (151a).

To this the Court replied:

> "I don't believe that is a proper request, and I will overrule it." (151a).

C. The Facts

Petitioner was born in Italy in 1906, came to the United States in 1923, and was naturalized in 1930 or 1931. His formal education consisted of

four years of grammar school in Italy, and approximately four months of night schooling in Canton, Ohio. (403a).

In 1933, with savings accumulated from his previous employment as a brick mason, he constructed and operated a small restaurant in Canton, Ohio (404a). In 1947; Petitioner's restaurant building was condemned by the City of Canton and Petitioner was required to build a new restaurant on the same site (406a). Construction was commenced in September, 1948, and completed in July, 1949 (409a). In order to maintain key personnel he set up a temporary operation at another location (369a). This temporary operation proved unsuccessful and he sold the fixtures and equipment in February, 1949, and ceased operating until the new restaurant could open (410a). As a result of the construction, Petitioner was out of business completely during September, 1948 and from February to July, 1949 (341a, 409a, 410a). The new restaurant building was erected at a total cost of $30,680.84 and equipped at a cost of $22,315.37 (534a). All costs were paid for by checks drawn on Petitioner's checking account and reflected in his books and records (248a, 249a, 425a-426a). A loan was obtained from a bank in the fall of 1949 to pay for the fixtures and equipment (426a, 534a-535a). At the trial, the Government took the position that the expenditures for the new restaurant building constituted diverted sales from the Petitioner's restaurant business for the years 1948 and 1949 (41a, 42a, 107a, 166a-167a). Accordingly, the Government reverted to the net worth method of determining Petitioner's income (107a, 166a-167a, 246a, App. 4).

All items included in the net worth of Petitioner as of December 31, 1947, 1948 and 1949, were the subject of stipulation by the parties, with the exception of the items "Currency in Safety Deposit Box and Other" for all years and "Personal Living Expenses" for the year 1947 (533a-535a). The net worth of Petitioner as of December 31, 1943, 1944, 1945 and 1946 was likewise the subject of stipulation by the parties, with the exception of the items "Currency in Safety Deposit Box and Other" and "Personal Living Expenses" (533a, 536a-537a). All of Petitioner's living expenses and non-deductible expenditures for the entire period January 1, 1942 to December 31, 1947, were testified to and accounted for (120a-122a).

In view of the stipulations entered into between the parties, the sole net worth item in issue at the trial was the question of Petitioner's cash on hand.

The investigation for the years here concerned was conducted by Special Agent Keller, the chief Government witness at the trial (94a). He was assisted in his investigation by Deputy Collector Kauffmann, who also testified as a Government witness (94a, 212a). Keller and Kauffmann stated that all of the books and records, including the general ledger, general journal, cash receipts journal, cash disbursements journal, cancelled checks, daily sales reports, original cash paid-out receipts, and original cash register tapes were on hand and made available to them by Petitioner's accountant (152a-154a, 227a-230a, 248a), and that they were well kept and in good condition (78a). *Keller and Kauffman further testified that the books and records were*

in substantial agreement with Petitioner's income tax returns as filed (96a, 159a, 223a), *and that their investigation disclosed no discrepancies in Petitioner's books and records* (165a-166a, 168a, 231a, 246a-247a, 248a).

Keller testified that he had computed Petitioner's cash on hand for the crucial dates and determined that Petitioner had cash on hand in the amount of $17,500 as of December 31, 1947, the net worth starting point for the indictment period (108a-109a).

The cash on hand as of the opening of the indictment period was arrived at by taking the cash on hand figure of $18,634.22, listed by the Petitioner on a financial statement dated September 30, 1948, which had been submitted to a bank, and subtracting therefrom the sum of $12,300 (sometimes during the course of the Government testimony stated to be $12,500) which Petitioner allegedly stated that he had on hand at the time of the prior investigation (118a).[3] The difference, which Keller computed to be $6,134.22 (but which actually amounted to $6,334.22), was added to the sum of $12,300 and was arbitrarily apportioned to each of the years 1944, 1945, 1946 and 1947, at the rate of $1300 per year and $1134.22 for the year 1948 (125a, 184a, 195a, 259a).

[3] The examination leading to the indictment in the case involved the years 1944 through 1949, inclusive (180a). Previously the Petitioner had been examined for the years 1934 through 1941, inclusive (82a), and was indicted under Section 145 (b) for the years 1940 and 1941. Because he "didn't have any books", he pleaded guilty to this indictment on the advice of his attorney (466a-467a).

Petitioner was also examined for the years 1942 and 1943 and certain civil adjustments were made but no fraud was alleged for these years (580a-591a, 594a-599a).

Because of the obvious weaknesses in such a method, Keller sought to substantiate his opening cash on hand determination by preparing an available funds statement. In this statement he determined total cash funds available to petitioner during the period commencing January 1, 1942, and ending December 31, 1947, to be $5,362.10 as follows (119a-122a):

Income Reported Per Original Tax Returns (1942-1947)	$26,077.26
Add: Depreciation 1942-1947	4,175.56
Total Funds Available	30,252.90[4]
Less: Expenditures 1942-1947	24,890.80
Net Available Funds	$ 5,362.10

The net available funds figure of $5,362.10 was then added by Keller to the currency alleged to be on hand as of December 31, 1941, in the amount of $12,300, resulting in a cash on hand determination at December 31, 1947, of $17,662.10 or approximately $17,500 (122a).

The net available funds figure computed by Keller failed to take into account approximately $9,323.05 which the Government claimed was Petitioner's additional income for the years 1942 to 1946 inclusive.[5]

[4] Apparent mathematical error.

[5] Petitioner was charged in a prior investigation with additional income for the years 1942 and 1943 in the amount of $3,269 on which he subsequently paid additional tax (595a-602a). In the present investigation Petitioner has been charged with understatement of income for the years 1944, 1945, 1946 and 1947 totalling $6054.05 (181a, 262a).

By failing to include these understatements for the pre-indictment years, Keller's available funds computation did not conform with the Government's own evidence and did not fully state the facts as they were known to the Government.

Had this money been taken into account, it would have pointed up the arbitrary nature of Keller's cash on hand computation. This failure, in practical effect also deprived Petitioner of a source of non-taxable funds with respect to the indictment years.

Petitioner testified on his own behalf (402a). He stated that he maintained a safe deposit box at the First National Bank, Canton, Ohio, for many years (419a), and that he had approximately twenty-eight to thirty thousand dollars available in this box as of December 31, 1947, to construct his restaurant building (419a). In 1948, Petitioner opened a safe deposit box at the George D. Harter Bank in Canton and transferred his cash funds to that box so that they would be available for deposit in the checking account he maintained at that bank, as needed, to pay for the cost of the new building (419a).

Petitioner further stated that the construction bills were paid by check, and that it was his practice to take the bills to his accountant who issued the checks in payment, and that he would take out the necessary funds from his safe deposit box, and deposit the cash funds to his checking account to cover the checks (425a-426a). The transfer of funds began approximately in September of 1948 (426a). In the fall of 1949, Petitioner arranged a bank loan to cover the cost of the fixtures, and was thereby enabled to keep cash on hand as operating capital for the new venture (426a-427a).

Other substantial evidence was adduced on behalf of Petitioner. His accountant (who testified both for the prosecution and defense (10a, 295a)) stated that Petitioner's records had been kept in accordance with the system installed by him in 1942 and under his super-

vision and control (295a-297a), and that he had no reason to believe that Petitioner's sales receipts were not being properly reported (41a, 296a-297a). He further stated that he was satisfied that Petitioner had invested additional cash in the business in 1948 and 1949 and that he had made entries to that effect at the close of each year (311a, 314a).

Petitioner also offered the testimony of a Certified Public Accountant as an expert witness. This witness stated that he had audited the original data, such as cash register tapes, cash pay-out slips, bills and daily sales reports,[6] and checked this data with Petitioner's general books of account (484a-485a). His examination revealed that all of the original data with minor exceptions were available and, except for a few slight errors, were in agreement with the general books of account (484a-485a). He further testified that he had examined the checking account and that this account reflected excess deposits for each of the years 1948 and 1949 indicating that a source of funds other than restaurant receipts had been deposited into the bank account (486a, 487a).

He stated also that he had examined the safe deposit box entry records, the cash receipts journal, and the bank statements for Petitioner's checking account for the years 1948 and 1949 (488a). His examination revealed substantial deposits were made by Petitioner from September 17, 1948 to June 18, 1949, and that in each and every instance a visit to the safe deposit box coincided with an entry on the bank statement, and

[6] Petitioner sought to introduce in evidence all of this original data, but his offer was denied by the trial court because they were too bulky and because the information had been copied into the general books of account (310a).

also with an entry made in the Cash Receipts Journal (488a-489a). These deposits totaled $15,985.15 in 1948, and $12,000 in 1949,[7] *and of these amounts $7,735.15 were made while the defendant's restaurant business was completely closed down* (488a-490a).

He stated that the Government had erred in failing to include the source of funds represented by the understatements determined by the Government amounting to $3,269. for the years 1942 and 1943, and $6,054.05 for the years 1944 through 1947, inclusive (498a, 510a).

[7] An examination of the Safe Deposit Entrance Record of the Harter Bank, pertaining to Petitioner's safe deposit box (579a), and the bank statements reflecting deposits made by him to his checking account at the Harter Bank (Defendant's Exhibit U) and the Cash Receipts Journal of Petitioner (Defendant's Exhibit L) revealed that in each and every instance that a visit was made to the safe deposit box by Petitioner, a deposit for the same date was reflected on his bank statements, and a corresponding entry was made in the Cash Receipts Journal (488a-489a, 579a) as follows:

Date of Visit, Deposit and Entry	Amount of Deposit	
September 7, 1948	$ 300.00	
September 10, 1948	400.00	
September 13, 1948	535.15	
September 21, 1948	500.00	
October 11, 1948	3250.00	
November 15, 1948	7000.00	
December 11, 1948	2000.00	
December 27, 1948	2000.00	
Total for 1948		15,985.15
January 17, 1949	2000.00	
February 7, 1949	2000.00	
February 23, 1949	2000.00	
March 18, 1949	2000.00	
June 18, 1949	4000.00	
Total for 1949		12,000.00
TOTAL DEPOSITS		$27,985.15

He also made a gross profit study on the basis of Petitioner's tax returns and the Government's figures. This study indicated that the sales, with the Government's claimed understatements included, were grossly distorted for the indictment years of 1948 and 1949 (500a-501a).[8]

He further testified that using the same starting point that Special Agent Keller had used—January 1, 1942—and taking into consideration all of the known sources of funds, Petitioner could have accumulated approximately $27,185 by December 31, 1947, the starting point of the Government's net worth for the indictment years (509a-516a).

REASONS FOR GRANTING THE WRIT

I

The *Jencks Act*, 18 U.S.C. § 3500,[9] was enacted on September 2, 1957 as Public Law 85-269, in the wake of this Court's decision in *Jencks* v. *United States*, 353 U.S. 657. The statute provides, *inter alia*, that once a Government witness has completed his direct examination, the defendant on motion is entitled to an order requiring the Government to produce all written

[8] The Gross Profit Study revealed the following:

Year	Per Return	Per Government Including Understatements
1944	37.1%	38.9%
1945	38.9%	41.3%
1946	39.9%	41.0%
1947	42.4%	42.4%
1948	47.1%	58.4%
1949	40.4%	55.5%

[9] Set out in full at pp. 3-5, *supra*.

statements in its possession made by said witness relating to the subject matter as to which the witness has testified. If the contents of any such statement relate to the subject matter of the testimony of the witness, the statute further provides that the court shall order the statement to be delivered to the defendant for his examination and use. If the Government claims any statement ordered to be produced contains matter which does not relate to the subject matter of the testimony of the witness, the Act requires that the statement shall be delivered *in camera* to the court, and the court shall excise the portions of the statement which do not relate to the subject matter of the testimony of the witness. The entire text is required to be preserved by the Government for examination by the appellate court, if appeal is had.

In this case, the trial court directed the Government to produce for an *in camera* inspection the statement of its chief witness, Keller, at the conclusion of his direct examination. However, when this statement was examined by petitioner's counsel, it became apparent that the Government had removed from the statement all exhibits attached thereto and referred to therein. When Petitioner's counsel requested the court to direct the production of the removed exhibits, the court held that the request was improper and overruled it. See pp. 6-7, *supra*.

In so ruling, the trial court rendered an important construction of 18 U.S.C. § 3500. It held, in effect (and the Court of Appeals, by affirming, has therefore also held), that exhibits which were the subject matter of the testimony of a Government witness and which were attached to and referred to in the witness' statement, do not constitute a part of the statement and therefore need not be produced along with the state-

ment, even for purposes of an *in camera* inspection by the court.[10]

This construction of the *Jencks Act* is important to the general administration of criminal justice in the federal courts, and is of particular importance in the trial of criminal tax cases. It is standard procedure for the special agent in charge of a criminal tax investigation to make a report at the conclusion of his investigation.[11] It is also standard procedure to attach as exhibits to this report the results of an investigation including net worth computations, statements of third party witnesses and other important evidence developed by the investigation.[12] And most important, is the fact that the special agent in charge of an investigation in-

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[10] The trial court's opinion is directed solely to the question of whether petitioner's original request, for one of the exhibits (Statement of Frank David—Exhibit I) should have been granted. As the transcript makes clear, Petitioner did not so limit his demand, *supra* p. 7, see also 135a-151a. Though Petitioner made specific mention in his demand for the statement given by Petitioner to Keller (135a), he also, from the outset, demanded "any other statements transmitted by Mr. Keller in connection with his testimony." 135a-138a; see also 140a-141a, 143a, 146a, 151a.

Though the trial court did not deal with the issue presented *in its opinion*, it clearly ruled on the issue *during the course of the trial*. And at the time the demand was made during the trial, the *Jencks Act* was expressly cited to the trial court and the court at the time acknowledged that it was "familiar with the statute" (136a, 137a).

The failure of the trial court to properly deal with the issue in its memorandum opinion and the failure of the court of appeals to write an opinion should not be permitted to obscure the issue, or to deprive the Petitioner of a review by this Court.

[11] Keller testified on *voir dire*: "We always submit a report at the conclusion of the investigation" (141a).

[12] See Keller's testimony at 142a-144a.

variably is called as the chief Government witness against the defendant.

If the decisions of the courts below represent a sound construction of the *Jencks Act*, then it becomes a simple matter for the Government to establish a policy which could completely frustrate the purpose of the Act and the decision of this Court which gave rise to the Act. The Government need only adopt a procedure under which an agent's reports would be brief and perfunctory with the main substance of his investigations relegated to exhibits. In this way, the critical portions of the agent's statement could be removed from the reach of a defendant.

While it has been held that failure to make available prior statements of a witness constitutes reversible error and no showing of prejudice is necessary, *Bergman* v. *United States* (C.A. 6), 253 F. 2d 933, 935-936, the critical consequences of the question here presented are best exemplified by what in fact occurred in this case.

The exhibits attached to Keller's report (as set forth in the Government's Brief in the court below) were as follows:

Exhibit No.	
A	Copy of Deputy Collector Dale Kauffman's report in re Frank David
B	Form 899, Certificate of Assessments and Payments
C	Photostatic copies of Frank David's 1944 return
D	Photostatic copies of Frank David's 1945 return

Exhibit No.

E	Photostatic copies of Frank David's 1946 return
F	Photostatic copies of Frank David's 1947 return
G	Photostatic copies of Frank David's 1948 return
H	Photostatic copies of Frank David's 1949 return
I	Sworn statement of Frank David
J	Sworn Statement of Simon A. Spilker
K	Financial statements of Frank David as of December 31, 1943, to 1949, inclusive, as prepared by his accountant Simon A. Spilker
L	Copies of net worth statements prepared by agents of the Bureau of Internal Revenue in prior examinations of the tax-payer's return
M	Sworn statement of Mrs. Mae Wise
N	Chronological list of conferences with tax-payer

Keller's testimony was all-inclusive. It encompassed the issues of cash on hand, the prior tax history of Petitioner, the statements and net worth of Petitioner, and other critical matters at issue. A substantial portion of his testimony related to information contained in the exhibits to his report (105a-106a, 126a-133a, 142a, 144a, 150a-151a).[13] He frequently testified concerning his interview with Petitioner on September 26, 1950 and transcribed in Exhibit I (e.g. 105a); and Exhibit L, containing the net worth statements in prior examinations, was the basis of his testimony in connection with cash on hand as of the opening of the indictment

period, and particularly with respect to his available funds computation (117a, 118a, 120a, 122a).

In view of the damaging and prejudicial nature of Keller's direct testimony, the impeachment of that testimony was singularly important to Petitioner. A proper defense made it imperative that Keller's report of examination be produced in its entirety—either to the trial court or the Petitioner—at the time of demand.[14]

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[13] During the course of Keller's *voir dire*, he was asked whether the exhibits to his report bore on his direct examination, and he answered that they did not (142a). In the context in which this colloquy occurred it is doubtful that Keller meant to say that the exhibits had no bearing on his testimony; but rather that the exhibits which contained statements of witnesses had no bearing on his testimony.

Nevertheless, it is clear under the *Jencks Act*, that it is not for the witness or the Government to decide the question of materiality and relevancy; the statute places this responsibility on the trial court. In consequence, Keller's denial (if it was so intended) has no bearing on the issue presented.

[14] None of the exhibits were produced for Petitioner's examination when the Keller report was turned over at the conclusion of Keller's direct examination. Later in the trial, some of the exhibits were either produced or introduced in evidence: Exhibits A and M were produced for inspection after Keller left the stand (252a, 288a). Exhibits B through K, inclusive, were introduced in evidence, some after Keller had left the stand; Exhibits L and N were *never produced or introduced and have to this day never been seen by either the trial court or the petitioner* and, were not submitted to the court of appeals.

That *some* of these exhibits were *later*, produced or introduced does not vitiate the prejudice stemming from the trial court's failure to order them produced at the conclusion of Keller's direct testimony. Petitioner had sought their production for purposes of cross examining Keller; but by the time they had become available, Keller had left the stand.

18 U.S.C. § 3500 indicates a congressional purpose that a complete report be submitted to the trial court. It specifically requires, even where the trial court excises portions of a statement, that "the *entire* text of such statement shall be preserved" for use by the appellate court. "Entire" means "complete", "total", "whole"; it does not authorize the removal of exhibits.

The issue raised in this case is different from but related to the issues in cases now pending before this Court on certiorari. *Lev* v. *United States*, No. 435; *Wool* v. *United States*, No. 436; *Rubin* v. *United States*, No. 437; *Rosenberg* v. *United States*, No. 451; *Palermo* v. *United States*, No. 471; *Pittsburgh Plate Glass Co.* v. *United States*, No. 489; *Galax Mirror Co., Inc.* v. *United States*, No. 491 (all O.T. 1958).

That this Court is presently concerned with the meaning and thrust of the *Jencks Act* and the consequences of its decision in *Jencks* v. *United States, supra*, is obvious. The question presented here holds at least as much importance as the questions presented in the cases in which certiorari has already been granted.

II

In the event that it is determined that the *Jencks Act*, 18 U.S.C. § 3500, does not require that exhibits attached to the statement of a Government witness be produced along with the statement, a serious question of constitutional due process emerges: Whether the *Jencks Act*, as so construed, denies to Petitioner the due process of law guaranteed by the Fifth Amendment, as determined by this Court in *Jencks* v. *United States*, 353 U.S. 657?

The trial court denied Petitioner's request to examine the exhibits attached to the Keller report. Yet, as we have indicated, pp. 18-19, *supra*, a substantial portion of Keller's testimony related to the information contained in these exhibits. In consequence, the effect of the decisions of the courts below was to deny access to a substantial portion of Keller's report for use in Petitioner's defense.

This is precisely what this Court appears to have held to be a denial of due process in the *Jencks* case:

> "We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. *Justice requires no less*". 353 U.S. at 668-669 (emphasis added).

Thus, to the extent that the withholding of the exhibits may be justified under 18 U.S.C. § 3500, that Act may contravene the due process clause of the Fifth Amendment.

In the court below,[13] the Government contended that the *Jencks* decision did not set a constitutional standard, and that the statute should therefore not be tested

[redacted]

[13] This question was not raised in the trial court, but was raised in the court below. This Court has authority to consider the question as a "plain error" and a "defect" "affecting substantial rights" pursuant to Rule 52(b), Federal Rules of Criminal Procedure; cf. Rule 40, 1.(d)(2), Revised Rules of the Supreme Court; *Wiborg* v. *United States*, 163 U.S. 632, 658.

against it. The Government's claim was that the *Jencks* decision rested upon this Court's supervisory authority over the administration of criminal justice in the Federal courts rather than upon constitutional foundations, and there is support for this view in a number of circuit court opinions. E.g. *Scales* v. *United States* (C.A. 4), 260 F. 2d 21, 44, *and cases cited; see* also *United States* v. *Grunewald* (S.D.N.Y.), 162 F. Supp. 621, 625. This problem is now before the Court in cases in which certiorari has been granted. E. g. *Rosenberg* v. *United States*, No. 451; *Palermo* v. *United States*, No. 471; *Scales* v. *United States*, No. 488.

III

A. In its prior investigation of Petitioner's income taxes, the Government assessed Petitioner with additional income of $3,269.00 for the years 1942 and 1943 (510a, 595a-602a). In addition, both Keller and Kauffmann testified that Petitioner had understated his income for the years 1944, 1945, 1946 and 1947 in the amount of $6,054.05 (181a, 262a, 510a). However, none of these understatements (i.e., those *assessed* for 1942 and 1943, or those *determined* for 1944 through 1947) were credited to Petitioner in Keller's additional available funds figure (119a-120a, 122a, 188a).

These understatements, totalling $9,323.05, represented additional sources of funds available to the Petitioner as of the opening of the indictment period *as determined by the Government*. Yet these funds were ignored in the computation relied upon by the Government to establish Petitioner's available funds as of that crucial date. Apart from the consideration of any of the other errors in the cash on hand figure claimed

by Petitioner in the courts below,[16] and based upon the Government's own figures, the Government's opening cash at December 31, 1947, was, therefore, deficient by $9,323.05. If this figure had been added to the Government's original computation of $17,500.00 in cash available as of December 31, 1947, Petitioner would have been credited with at least $26,823.05—which would have substantially supported Petitioner's claim that he had cash on hand on that date of approximately $28,000.00.

The failure of the courts below to require that these understatements be considered in establishing petitioner's opening net worth for the indictment period[17] is in implicit conflict with the decision of the Second

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[16] In the courts below, Petitioner also claimed that he should have been credited with the "Doud Money" in the amount of $10,500, representing funds available for the purchase of the restaurant property in 1942; and the "Wise Money", $2,000 of which was recovered in the pre-indictment years and the balance of $10,000 in November of 1948. However, these matters are not in issue here.

[17] Neither of the courts below reached this question because of an apparent misunderstanding with respect to the facts:

The trial court, in its memorandum opinion, held that "Defendant complains that the Government computations did not reflect any credit for his understatements during the pre-indictment years. The testimony of Mr. Keller is to the contrary as he testified that the difference in cash amounting to over $6,000 was pro-rated as additional income over those years. Defendant had paid taxes of $3,269 additional income, and the Government also took into account his living expenses during those years * * *." (App. 8, *infra*)

This conclusion of the trial court is clearly in error, since Keller's available funds computation was based solely on income reported per original tax returns (p. 11, *supra;* 119a-120a, 122a, 188a).

By affirming the decision of the District Court "upon the grounds and for the reasons stated in the memorandum opinion" (App. 1, *infra*), the Court of Appeals fell into the same error.

Circuit in *United States* v. *Altruda*, 224 F. 2d 935, where such failure was held to constitute reversible error. In that case, the Government claimed that the defendant had understated his income from certain realty holdings. The Government did not, however, credit him with these understatements on an exhibit which purported to reflect his net worth increases on arriving at his cash on hand as of the opening of the indictment period. The Court ruled that "the omission of these items, of which the Government had notice prior to trial, from Ex. 67 * * * served to make that exhibit incomplete, inaccurate and misleading and the failure of the trial judge to sustain objection to its admission in evidence operated to the prejudice of the defendant." 224 F. 2d at 942.[18]

This Court's decision in *Holland* v. *United States*, 348 U.S. 121, did not expressly deal with the problem which arises from understatements in pre-indictment years. In that case, this Court gave as examples of nontaxable sources of alleged net worth increases, "prior earnings, stock transactions, real estate profits, inheritances, gifts, etc." 348 U.S. at 127; and "gifts, loans, inheritances, etc." 348 U.S. at 137. And while understatements from pre-indictment years would seem to be encompassed by the term "prior earnings", they would certainly, as a matter of logic, fall within the general category of nontaxable sources set out in

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[18] In *United States* v. *Altruda*, *supra*, the Government unsuccessfully contended that the defendant had understated his living expenses and that those understatements should offset the cash credit resulting to him from the understatements in income. 224 F. 2d at 942.

In the instant case, all of Petitioner's living expenses and nondeductible expenditures were testified to and accounted for during the entire period January 1, 1942 to December 31, 1947. (120a-122a, App. 8).

Holland. It would be manifestly unconscionable to permit the Government to rely on this evidence to prove an element of the prosecution case and deny to a defendant the right to rely on the same evidence in establishing his defense. Cf. *United States* v. *Reynolds*, 345 U.S. 1, 12.

The determination of the question of whether a criminal tax defendant should be given credit for the understatements charged against him by the Government for pre-indictment years, and its consequential effect on the question of likely source, is of manifest importance in the administration of the Internal Revenue Laws and the prosecution of criminal tax cases. The Government, invariably, in net worth cases, introduces such evidence for the purpose of proving scheme, motive and design on the part of the criminal tax defendant in order to establish the indispensable statutory requirements of intent and wilfullness.[19] See, e.g., *Mitchell* v. *United States* (C.A. 9), 213 F. 2d 951, 958, cert. den. 348 U.S. 912; *Himmelfarb* v. *United States* (C.A. 9), 175 F. 2d 924, 941, cert. den. 338 U.S. 860; *Malone* v. *United States* (C.A. 7), 94 F. 2d 281, 286-287, cert. den. 304 U.S. 562; *Tinkoff* v.

[19] At the trial, when the Government offered testimony relating to the investigation of Petitioner's tax returns for the years 1934-1941, and the defense objected, the court overruled the objection and instructed the jury: "You will not consider this evidence as any proof concerning his guilt. But the evidence will be received merely for the purpose of showing a tax history and as bearing on the question of its [sic] intent in this matter" (80a-81a).

In its memorandum opinion (App. 7, *infra*), the trial court also observed: "The jury * * * could, in determining his credibility, take into account his previous plea of guilty in this Court, to the charge of income tax evasion for the years 1941 and 1942, and the fact that each year thereafter he understated his income * * *."

United States (C.A. 7), 86 F. 2d 868, 879, cert. den. 301 U.S. 689. Whether these understatements may also be used by a criminal tax defendant as a source of funds, and as bearing on the issue of likely source, is the necessary other side of the coin, and is a problem which has not been, but should be, determined by this Court.

B. The Government's failure, in this case, either to include the source of funds represented by pre-indictment year understatements, or negative them, presents a further issue in the light of this Court's decisions in *Holland* v. *United States*, *supra*, and *United States* v. *Massei*, 355 U.S. 595.

Generally, likely source has been proved in two ways. When the taxpayer was the owner of an undisclosed business, proof that the undisclosed business was capable of producing income was sufficient. *United States* v. *Johnson*, 319 U.S. 503. Likewise, where the ownership of a business is disclosed, likely source is sufficiently established when the Government proves that the disclosed business was capable of producing much more income than was reported, and in amounts sufficient to account for the claimed understatements. *Holland* v. *United States*, *supra*.

No claim is made that the Petitioner was engaged in or owned any undisclosed business, or had any other source of unreported income (176a-177a, 179a, 189a, 246a-247a). The crucial question, therefore, was whether the Petitioner's disclosed business—the res-

taurant—was capable of producing the net worth increases attributed to it for the indictment years.[20]

The showing made in the instant case was clearly to the contrary. Uncontroverted evidence indicated that after Petitioner's building had been condemned by the City of Canton (339a, 406a), he had closed his restaurant for several weeks in 1948, and moved to a temporary location, in order to raise and rebuild the original location (339a, 409a-410a). While operating in the temporary location, business was below normal (357a, 410a). In addition, Petitioner was completely out of business for over four months during 1949, and his chief source of income was therefore eliminated during that period (231a, 410a). These disrupted years mani-

[20]

BUSINESS INCOME

	(1) Restaurant Income	(2) Parking Lot Rental*	(3) Total Per Return	(4) Purported Understatements	(5) Total Per Government
1944	$ 813.68	$	$ 813.68	$ 1,966.05	$ 2,779.73
1945	2,553.51		2,553.51	2,764.14	5,317.65
1946	5,156.46		5,156.46	1,323.86	6,480.32
1947	677.31	1,285.70	1,963.01	—0—	1,963.01
	9,200.96	1,285.70	10,486.66	6,054.05	16,540.71
1948	1,774.72	1,637.36	3,412.08	13,065.28	16,477.36
1949	(4,271.20)	1,883.23	(2,387.97)	12,965.03	10,577.06
	$ (2,496.48)	$3,520.59	$ 1,024.11	$26,030.31	$27,054.42
	$ 6,704.48	$4,806.29	$11,510.77	$32,084.36	$43,595.13

Data in Columns 1, 2, and 3 obtained from Government Exhibits 2 to 7, inclusive, the copies of the original tax returns filed. For data in Column 4, see (181a, 262a, 554a-555a). Column 5 represents addition of Columns 3 and 4.

* Prior to 1947, the defendant operated a parking lot, and the receipts therefrom were included as part of the restaurant business. In 1947, the parking lot was leased to a third party, on a fixed monthly rental basis. The rental income was listed separately in Schedule B of the defendant's tax returns. The figure shown above is the net income after expenses.

festly could not have produced the income necessary to support the Government's claims. Note, in this regard, Gross Profit Study, *supra*, p. 15, fn. 8.

In addition, Special Agent Keller, who conducted the investigation and was the chief prosecution witness, made the devastating admission that *he did not know until the trial was in progress that Petitioner's restaurant had been closed for periods during the indictment years and that no income had been derived from it during part of 1948 and 1949* (169a, 173a). This admission clearly casts doubts on whether the Government could, or did, carry the burden as to likely source placed upon it under *Holland* and *Massei*.

Finally, and even more significant, was the fact that during the same period, substantial deposits were made to Petitioner's checking account, and shown on the books, which *deposits correlated exactly with the date of his entries to his safe deposit box* at the George D. Harter Bank in Canton (*supra*, p. 14, fn. 7). From September 7, 1948, the approximate date on which construction of the new building was commenced, to July 1, 1949, the approximate date of completion, the total excess deposits amounted to $27,985.15, of which amount $15,985.15 was deposited between September 7, 1948, and December 27, 1948, and $12,000 deposited between January 17, 1949, and June 18, 1949. *$7,735.15 of the total was deposited during the periods when the restaurant was completely closed down* (488a-490a, 579a). The total of these deposits approximately equalled the total of the alleged understatements ($13,065.28 for 1948 and $12,965.03 for 1949) (554a-555a). These deposits indicate that Petitioner's business could not and was not producing undisclosed income during the years involved for, if it had, there

would have been no need to add outside funds during the same period.

Thus, the requisite showing that Petitioner's business accounted for the increases in net worth during the indictment period has not been made in this case. Proof of the likely source required by *Holland* was entirely lacking. The negativing of all possible sources of nontaxable income required by *Massei* was equally lacking. At best, this conviction rests on "increases in net worth, standing alone", which, this Court has admonished, "cannot be assumed to be attributable to currently taxable income". *Holland* v. *United States*, 348 U.S. at 137-138; *cf. Thomas* v. *Commissioner* (C.A. 1), 232 F. 2d 520, 526.

First in *Holland* and then in *Massei*, this Court has set out the requirements with respect to the problem of likely source as it arises in net worth prosecutions. But the principles which these decisions establish can have force and effect only to the extent that they are carefully and consistently applied. If they may be improperly applied, if they may be sometimes disregarded, the practical protection this Court so painstakingly fashioned loses its high function. Moreover, since there are dangerous pitfalls inherent in the net worth method, a failure to carefully control its use in accordance with the principles laid down by this Court may result in serious injustice to the innocent.

We believe that this case presents a striking instance in which one of these principles has been violated or ignored, with the result that Petitioner has been "ensnared" in the very dangers and pitfalls which it was this Court's announced intention to protect against.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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